No. 85-552

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

YOSH SAKAMOTO, PACIFIC GIFT SUPPLY, INC., and TOP ENTERPRISES, INC.,

Petitioners,

—against—

DUTY FREE SHOPPERS, LTD., GUAM AIRPORT AUTHORITY, AND THE GOVERNMENT OF THE UNINCORPORATED TERRITORY OF GUAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS GUAM AIRPORT AUTHORITY AND DUTY FREE SHOPPERS, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "dormant" Commerce Clause apply to conduct of the government of the Unincorporated Territory of Guam?

2. Do the federal antitrust laws apply to conduct of the government of the Unincorporated Territory of Guam?

3. Is summary judgment dismissing plaintiffs' Commerce Clause and antitrust claims supported by any of the numerous grounds for dismissal which the Court of Appeals did not reach, but which were recognized by the District Court and the concurring opinion in the Court of Appeals, and/or were raised by defendants below?

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STATEMENT OF THE CASE[1]

1. The Parties.

Plaintiffs/petitioners are Guam merchants. Pet. App. 22.[2] By their admissions, they are profitable enterprises that, like numerous other vendors in Guam, are able effectively to sell

1 The statutes, rules and regulations, and ordinance cited herein are set out at Res. App 2-15. The constitutional provisions involved in this case appear at Pet. 2.

2 The opinion of the District Court of Guam is reprinted at Pet. App. 1-21. The opinion of the Court of Appeals is reprinted at Pet. App. 22-29.

and deliver merchandise to their customers at a variety of locations. Pet. App. 13.[3]

Defendant Government of the Unincorporated Territory of Guam ("GovGuam") was created by Congress in the Organic Act of Guam. 48 U.S.C. § 1421a. It is authorized to regulate all matters of local application, and, in particular, to grant franchises, privileges and concessions. 48 U.S.C. § 1423a. These powers are subject to Congress' specific authority to annul the legislation of and otherwise supervise the government of Guam,[4] and to Congress' general plenary power over the Territories. U.S. Const. art. IV, § 3, cl. 2.

Until 1975, GovGuam directly owned and operated the Guam International Air Terminal ("Airport"). Pet. App. 3. In that year, it created its instrumentality defendant Guam Airport Authority ("GAA") to perform that function. Pet. App. 3.[5] The GAA is empowered, *inter alia*, to grant Airport concessions, "manage and operate the Airports in the most efficient manner consistent with the protection of the bondholders," "keep the Airports on a self-sustaining basis" and "do any and all other things necessary to the full and convenient exercise of its power." Guam Gov't Code §§ 62004(e), (h), (m), 62010, 62114. As plaintiffs have admitted, the GAA may "decide who may do business at the airport," and is authorized

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3 *See* Yosh Sakamoto and Pacific Gift Supply, Inc.'s Responses to Requests for Admissions, and Top Enterprises, Inc.'s Responses to Requests for Admissions ("Admissions") at Res. App. 18, 19-21, 23-25.

4 *E.g.*, 48 U.S.C. §§ 1423i (all laws enacted by the government of Guam shall be reported to the federal government; Congress "reserves the power and authority to annul the same"), 1421a (GovGuam "shall be under the general administrative supervision of the Secretary of the Interior"), 1422 (Guam Governor must submit annual report to Secretary of Interior and Congress), 1422d (Inspector General, Department of the Interior has responsibility for maintaining "a satisfactory level of independent audit oversight of the Government of Guam"), 1424-2.

5 Guam Gov't Code §§ 62001 (the GAA is "a public corporation and autonomous instrumentality of, the government of Guam"), 62004(a), Public Law 13-57 Section 5. *See* Pet. 12 (GAA "an autonomous agency" of GovGuam).

under local law to prevent all persons from selling or delivering merchandise at the Airport unless they have received written permission from the GAA, which plaintiffs admittedly never have received.[6]

Defendant Duty Free Shoppers, Ltd. ("DFS") is the exclusive merchandise concessionaire at the Airport.

2. The Facts.

In their efforts to finance the operation and improvement of the Airport, GovGuam and subsequently the GAA have long granted exclusive merchandise concession rights at the Airport. Pet. App. 3, 23.[7] It is common practice for airport concessions to be exclusive; such concessions help maximize the revenues of the airport authority, and avoid undue congestion and impairment of airport operations.[8]

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6 Brief of Plaintiffs-Appellants in the Court of Appeals ("Pl. App. Brief") at 10; Admissions at Res. App. 18, 23. *See* Guam Gov't Code §§ 62004(e), (h), (1), (m), 62013(a); Rules and Regulations of the GAA §§ 3030, 3030.3 ("No person shall carry on any commercial activity at the Air Terminal without the written consent of the Authority"), 3030.5, 3036.4(a), and 3039.5(b), (c).

7 Deposition of R.M. Stone, dated June 20, 1983 ("Stone Dep."), Record before the District Court ("CR") 80 at 17-26, 29-30 (continuous policy since 1967 of exclusive sale and delivery rights at Airport); Supplementary Affidavit of R.M. Stone ("Stone Supp Aff."), Excerpt of Record before the Court of Appeals ("ER") at 542-43.

8 *E.g.*, Affidavit of R.M. Stone, dated May 18, 1983 ("Stone Aff."), ER at 270-72; Stone Dep. CR 80 at 9-12, 26, 39 (exclusive concessions used to maximize revenues at "any number of airports"); Alaska Stat. § 02.15.091(a) (1982) ("[T]he department shall allow the sale and delivery of in-bond merchandise at an international airport only by an exclusive contract."); *Deak-Perera Hawaii v. Dept. of Transportation*, 553 F.Supp. 976 (D. Hawaii 1983), *aff'd*, 745 F.2d 1281 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1756 (1985) (upholding exclusive foreign exchange concession at Honolulu International Airport); *All American Cab Co. v. Metropolitan Knoxville Airport Authority*, 547 F. Supp. 509 (E.D Tenn. 1982), *aff'd*, 723 F.2d 908 (6th Cir. 1983) (upholding exclusive airport concession for limousine services).

GovGuam awarded the initial exclusive Airport merchandise concession in 1967. The Governor of Guam, who was then a direct federal appointee, expressly approved that agreement.[9]

In 1978, the GAA awarded the current concession, after a well publicized competitive bid. Pet. App. 3; Admissions at Res. App. 16, 21. DFS won that bid by guaranteeing payment of over $140 million in concession fees. Pet. App. 4, 23. It is undisputed that if it were not for the exclusive nature of the concession, no firm would have made that high a guarantee. Pet. App. 8.[10]

Based upon DFS' guarantee, in 1979 the GAA (with the approval of the Guam Legislature)[11] sold $43 million of revenue bonds. Pet. App. 4, 9. The GAA used the proceeds of the sale to build a new Airport terminal complex, at a cost in excess of $50 million. Pet. App. 4. That complex was completed in January 1982, the month before this suit was brought. Pet. App. 1, 4.

Plaintiffs did not in 1978 seek to bid for the exclusive concession, or ask the GAA to grant delivery rights on a non-exclusive basis. Pet. App. 4, 14, 20; Admissions at Res. App. 17, 22.[12] Nor has the concession prevented them from doing business effectively. Plaintiffs admit that they are perfectly able to sell and deliver merchandise to their customers and operate profitably without use of the Airport as their place of business. Admissions at Res. App. 18, 19, 21, 23, 25. Customers can and do buy and receive delivery of merchandise from plaintiffs and numerous other vendors at many locations

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9 1967 General Merchandising Concession Lease, ER at 305; Pl. App. Brief at 3. That agreement was assigned to DFS in 1972. Assignment of General Merchandising Concession Lease, ER at 307.

10 *See* Stone Aff., ER at 270; Stone Dep., CR 80 at 26-28.

11 *See* Resolution I-S of the Fifteenth Guam Legislature, 1979 (authorizing sale of bonds supported by revenues accruing under concession agreement, and approving amendment to that agreement), ER at 61.

12 Plaintiffs were not in business in 1967, when the previous concession was awarded. Pet. App. 14.

in Guam other than the Airport, and are free to take the goods so delivered through the Airport to their destinations. Pet. 3; Pet. App. 13, 23, 29; Admissions at Res. App. 18, 23. Plaintiffs have been so successful that, by their admissions, they typically charge and receive higher prices for their merchandise than does the fee-paying concessionaire for similar goods. Admissions at Res. App. 18, 23.

Thus, plaintiffs' interest in this suit is simply in their desire to offer their customers a single additional convenience, delivery at the Airport. Pet. 3; Pet. App. 13. The outcome of this litigation is of far greater significance to Guam.

As the District Court emphasized, Guam's principal civilian industry, tourism, and its economy generally, depend upon the continued successful operation of the Airport. Pet. App. 10; Stone Aff., ER at 277. The current merchandise concession agreement provides a principal source of revenue for the operation and improvement of the Airport, and for the payments on the GAA's 1979 airport revenue bonds. Pet. App. 8, 20-21; Stone Aff., ER at 277-79. The concession agreement provides that, if the right to deliver merchandise at the Airport ceases to be exclusive for more than sixty days, the guaranteed concession fees will be substantially abated. Pet. App. 21; 1978 Guam Airport Concession Agreement, ER at 320, 332-33. Not only would implementation of this abatement provision impair the GAA's ability to operate, maintain, and improve the Airport, it likely would put the GAA into default under its revenue bonds, and would cripple Guam's ability to enter into future concession agreements or otherwise raise money for public projects. Pet. App. 21; Stone Aff., ER at 278-79. As the District Court recognized, such a result would have a "devastating effect" on Guam's tourism industry and its general economy. Pet. App. 21. *See* Stone Aff., ER at 278-79.

Plaintiffs' suit also threatens the orderly functioning of the Airport. Plaintiffs admit that in order to make their desired deliveries at the Airport, they would require the use of space at the facility. Pl. App. Brief at 46. They also assert that if they have the right to make deliveries at the Airport, so do all other

merchants. Admissions at Res. App. 20, 25. Thus, if plaintiffs were to prevail, the ability of the GAA to operate the Airport as an efficient transportation facility would be severely impaired. Stone Aff., ER at 279-80; Stone Dep., CR 80 at 27, 114-15.

3. Prior Proceedings.

In their Amended Complaint, plaintiffs claimed that the Airport concession agreements are invalid under a variety of provisions, including Sections 1, 2 and 3 of the Sherman Act, 15 U.S.C. § 1-3, the Commerce Clause of the Constitution, art. 1, § 8, cl. 3, and the Equal Protection Clause, U.S. Const. amend. XIV, cl. 1. Amended Compl., ER at 1-16. After some discovery was taken, plaintiff Pacific Gift Supply, Inc. moved for partial summary judgment, and defendants moved for summary judgment on all of plaintiffs' claims. Pet. App. 2.

The District Court denied plaintiff's motion, and granted defendants summary judgment for numerous reasons, including, *inter alia*: (1) antitrust claims—defendants' conduct is immune from antitrust scrutiny, plaintiffs lack standing (including lack of legal injury, lack of antitrust injury and lack of a causal nexus between the alleged injury and the alleged violation), plaintiffs' claims are barred by the statute of limitations and the doctrine of laches, the concession increases competition and is reasonable as a matter of law, and the exclusivity of the current concession agreement resulted from a unilateral decision by the GAA, not concerted action; (2) Commerce Clause claims—the dormant Commerce Clause does not apply to the government of Guam, and the concession does not burden commerce, but rather promotes the flow of commerce; and (3) Equal Protection claims—the government of Guam did not discriminate against plaintiffs, and its conduct has a rational relationship to legitimate government interests. Pet. App. 6-21.

In the Court of Appeals, plaintiffs asserted only their Commerce Clause, Sherman Act and Equal Protection claims. And,

as in the District Court, plaintiffs limited those claims to the exclusive right granted DFS to deliver merchandise at the Airport, conceding the legality of the exclusive right of sale at the Airport. Pl. App. Brief 17; Pet. App. 2, 23, 29.

The Ninth Circuit affirmed the dismissal of each of plaintiffs' remaining claims. It held that the negative implications of the Commerce Clause, designed to protect Congressional authority against the actions of the sovereign states, do not apply to the government of Guam, which is a creation of Congress and subject to its plenary control. Pet. App. 23-27. The concurring opinion declined to reach this ground for dismissal because it found that the challenged conduct does not burden commerce, but only requires other vendors to complete their sales transactions by delivery at a location other than the Airport. Pet. App. 29.

The Court of Appeals further held that, since the government of Guam was created by Congress and is subject to its control, its conduct, like that of Congress, is immune from antitrust scrutiny. Pet. App. 27-28. Finally, the court rejected plaintiffs' equal protection contentions because the concession agreements have a rational relation to legitimate government interests. Pet. App. 28.

In their petition for a writ of *certiorari*, plaintiffs seek review only of the dismissal of their remaining Commerce Clause and antitrust claims. Pet. i.

SUMMARY OF ARGUMENT

Plaintiffs are unable to present any issue that warrants review by the Court.

1. The decision of the Court of Appeals was correct, and plaintiffs have identified no conflicting decision in this Court or any Court of Appeals.

a. Plaintiffs' Commerce Clause argument fails on its own touchstone—Congressional intent. All of the Courts of Appeals that have decided the issue have agreed, and plaintiffs apparently concede, that the restrictions imposed on the sovereign states by the "dormant" Commerce Clause do not apply of their own force to the government of a Territory. And, unlike its application of the entire Constitution to the former incorporated Territories of Alaska and Hawaii, Congress has chosen to apply only certain Constitutional provisions to the government of Guam, not including the dormant Commerce Clause. Indeed, although the policy of exclusive Airport concessions has been in effect continuously since 1967, when it was approved by a direct federal appointee, Congress has taken no step to change it. Far from impinging upon Congressional authority, the decision of the Court of Appeals therefore directly implements Congressional intent.

b. Consistent with an unbroken string of Court of Appeals decisions, plaintiffs have acknowledged that Congress did not intend to subject itself or its instrumentalities to the civil and criminal sanctions of the antitrust laws. And, unlike the municipalities to which plaintiffs liken it, the government of Guam is a creation of Congress, intended to perform functions Congress otherwise would have to perform itself, and directly limited by Congressional authority. In the Local Government Antitrust Act of 1984, Congress extended the antitrust immu-

nity of municipalities. Instead of treating the Territories as municipalities, which still do not have unlimited antitrust immunity, it categorized them in that statute with the States, the conduct of which is unqualifiedly immune from antitrust scrutiny. In any event, even if the government of Guam were akin to a municipality for antitrust immunity purposes, the conduct challenged here would be immune as more than reasonably foreseeable from the authority granted in the Guam Organic Act.

2. In addition to consideration of the two issues reached by the Court of Appeals, further review of this case would involve the numerous other defenses that warrant dismissal of plaintiffs' claims, including the alternative grounds for dismissal found by the District Court and the concurring opinion in the Court of Appeals. Plaintiffs' briefs have not even attempted to refute certain of those defenses. Based in part on plaintiffs' admissions and other uncontroverted evidence in the record, those other grounds counsel strongly against further review.

REASONS FOR DENYING THE WRIT

I. PLAINTIFFS HAVE OFFERED NO REASON WARRANTING REVIEW OF THE HOLDINGS OF THE COURT OF APPEALS

A. The Dormant Commerce Clause Does Not Apply to the Government of Guam

As the District Court observed, regulating the commercial use of the island's sole civilian airport, and raising funds for its operation and improvement, are crucial for the economic well-being of the people of Guam. Pet. App. 10, 19, 21.[13] Plaintiffs do not assert that the exclusive Airport concession—which provides such important local benefits—violates the

13 *See* Admissions at Res. App. 16, 17, 21, 23; Stone Aff., ER at 277-78; *Deak Perera Hawaii, Inc. v. Dept. of Transportation*, 553 F. Supp. at 978 (recognizing importance of airport to island where tourism is the main industry).

Guam Organic Act or Guam law. To the contrary, they have admitted that the GAA has authority under local law "to decide who may do business at the airport," and to bar unauthorized persons from selling or delivering merchandise there. Pl. App. Brief at 10; Admissions at Res. App. 18, 23.[14]

Plaintiffs contend, however, that the Airport concession is prohibited by the Commerce Clause.[15] Without even reaching all of the available grounds, the Court of Appeals correctly rejected this claim.

All of the Courts of Appeals that have decided the issue have concluded, and plaintiffs appear to acknowledge, (Pet. at 8), that the "dormant" Commerce Clause does not apply of its own force to the government of a Territory.[16] The dormant Commerce Clause doctrine was created by the Court to ensure

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14 *See* Rules and Regulations of the GAA § 3030.3 (prohibiting commercial activity at Airport without written permission of GAA). Compare Hawaii Administrative Rule § 19-14-3(i) (same); Los Angeles Admin. Code, Art. 4, Ch. 1, Div. 23, § 23.27(b) (same).

15 Pet. i, 4-10; Amended Compl. ¶ 45, ER at 13; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, ER at 100-103; Reply of Plaintiffs to Defendants' Motion for Summary Judgment, ER at 388; Plaintiffs' Reply Memorandum, ER at 573-82; Pl. App. Brief at 8-11; Pl. App. Reply Brief at 2-3.

16 *U.S. v. Husband R. (Roach)*, 453 F.2d 1054, 1059 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) ("Congress being given extensive power [under the Commerce Clause and the Territories Clause], the Governor as its delegate is not subject to the limitations imposed upon a state legislative body by the commerce clause"); *Anderson v. Mullaney*, 191 F.2d 123, 128 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952) (Commerce Clause does not, *ex proprio vigore*, limit a Territorial Legislature); *Buscaglia v. Ballester*, 162 F.2d 805, 807 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947) (The Commerce Clause "can have no consequential effect of limiting territorial action since Congress already has the power under Art. IV, Section 3, Cl. 2, supra, to limit such action to any extent it chooses, even to the extent of annulling local legislation."). Far from abandoning its decision in *Buscaglia* (*see* Pet. at 9), the First Circuit in *Caribtow Corp. v. Occupational Safety & Health Review Comm.*, 493 F.2d 1064, 1068 n.11 (1st Cir.), *cert. denied*, 419 U.S. 830 (1974) had "no occasion here to reconsider that opinion in the light of intervening events."

that the states do not, by the exercise of their own sovereign powers over local affairs, impinge upon Congress' authority to regulate interstate and foreign commerce, or unduly interfere with the free flow of such commerce. *E.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-69 (1945). A Territorial government has no power except that granted it by Congress.[17] If Congress disapproves of the way in which the power it has delegated to a Territory has been used, Congress can, as plaintiffs concede, directly curtail the Territory's power or change its conduct (subject, of course, to other legal requirements, such as due process). *E.g.*, U.S. Const. art. IV § 3 cl. 2; 48 U.S.C. § 1423i; Pet. 4.

The dormant Commerce Clause therefore should apply to a territorial government only if Congress applies it. In the case of Guam, Congress has decided not to do so.

The Guam Organic Act confers authority upon the government of Guam, and lists the restrictions that Congress imposed on that authority, including certain Constitutional limitations. *See* 48 U.S.C. § 1421b. These limitations do not include the dormant Commerce Clause. Under the maxim *expressio unius est exclusio alterius*, it is clear that Congress, retaining plenary power over Guam, did not intend to apply that provision to the government of Guam. *See, e.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978) (by listing exemptions in statute, Congress presumed to intend to exclude any other exemption).

This conclusion is buttressed by the 1968 amendments to the Guam Organic Act, in which Congress imposed certain additional Constitutional limitations on the government of Guam to the extent they previously had not been applied. 48 U.S.C. § 1421b(u). Congress did not include the Commerce Clause in this list, even though six years before the District Court of

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17 Pl. App. Brief at 3; *United States v. Wheeler*, 435 U.S. 313, 321 (1978) (a territorial government acts as "an agency of the federal government," and is "entirely the creation of Congress"); *United States v. Kagama*, 118 U.S. 375, 379-80 (1886) ("territorial governments owe all their powers" to Congress).

Guam had refused to apply the dormant Commerce Clause to the government of Guam,[18] and both the First and Ninth Circuits had by 1968 decided that the dormant Commerce Clause does not apply of its own force to the governments of Territories. *Anderson v. Mullaney, supra*; *Buscaglia v. Ballester, supra*.

Indeed, the policy of exclusive Airport concessions was begun in 1967 with the express approval of the Governor of Guam, who was a direct federal appointee.[19] And Congress has taken no step to change that policy. *See Ranes v. Office Employees International Union*, 317 F.2d 915, 917-18 (7th Cir. 1963) (Congress presumed to be aware of practices of an entity subject to its regulation).[20]

Plaintiffs' principal citation, *Anderson* v. *Mullaney*, 191 F.2d 123 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952), relating to the former Territory of Alaska, simply confirms that Congress did not intend to apply the dormant Commerce Clause to Guam. In the Alaska Organic Act, Congress provided that "The Constitution of the United States . . . shall have the same force and effect within the said Territory as elsewhere in the United States." 48 U.S.C. § 23. That provision is in marked contrast to the approach later taken by Congress in the Guam Organic Act.[21] And, it was in light of that provision that

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18 *Ambros, Inc. v. Maddox*, 203 F. Supp. 934, 937 (D. Guam 1962).

19 *See* 1967 General Merchandising Concession Lease, ER at 305; Pet. App. 3; Stone Aff., ER at 268-69; Stone Supp. Aff., ER at 542-43; Pl. App. Brief at 3.

20 Congress' plain intent in the Guam Organic Act not to apply the dormant Commerce Clause to the government of Guam makes completely inapplicable the decisions cited by plaintiffs (Pet. at 8) construing the Guam and Virgin Islands Organic Acts with regard to other issues.

21 *See* S. Rep. No. 2109, 81st Cong., 2d Sess. (explaining Guam Organic Act) (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News 2840, 2854 ("As an unincorporated Territory, Guam, like Puerto Rico and the Virgin Islands, is appurtenant to the United States and belongs to the United States but is not a part of the United States, as distinguished from Alaska and Hawaii, which are incorporated Terri-

the Court invalidated the challenged Alaska law (under the Privileges and Immunities Clause of Art. IV, § 2 of the Constitution).[22] *See also Duncan v. Kahanamoku*, 327 U.S. 304, 317 (1946) (in light of Hawaii Organic Act provision "that the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States . . . ," it "becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii").

Plaintiffs also cite a variety of other decisions from the Ninth Circuit, and two Third Circuit decisions. Pet. 10. None of those cases decided the question of the applicability of the dormant Commerce Clause to a territorial government; they just assumed it. As the Court of Appeals stated, Pet. App. 26, such assumptions do not constitute precedent. *E.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Nor, in any event, should any alleged conflict between the decision below and any other decision of the Ninth Circuit provide a basis for review by this Court. The correct procedure for resolving a perceived difference between panels within a circuit is to request a rehearing *en banc*. Plaintiffs did not do so. Pet. 1.

Thus, plaintiffs have failed to adduce any basis for further review of their Commerce Clause claims.

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tories. Unincorporated areas are not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them.").

22 Unlike its omission of the Commerce Clause, Congress has applied the Privileges and Immunities Clause of Art. IV, § 2, to the government of Guam. 48 U.S.C. § 1421b(u).

B. The Challenged Conduct Is Immune from Scrutiny Under the Federal Antitrust Laws.

All of the Courts of Appeals that have addressed the issue have agreed that the conduct of federal agencies and instrumentalities is immune from antitrust scrutiny.[23] Plaintiffs acknowlege this proposition, Pet. App. 27, and concede that the conduct challenged here is conduct of the government of Guam. Pet. App. 6. They argue, however, that the government of Guam should be treated as a muncipality, not as a federal instrumentality, for antitrust purposes.

Plaintiffs base this position principally on *United States v. Wheeler*, 435 U.S. 313 (1978). That decision does not equate Territories with municipalities. It simply explains that, as municipalities are creatures of state governments, territories are creatures of the federal government, with no inherent sovereign power. It is precisely because a Territory is created by Congress to perform functions for Congress, and is subject to Congress' plenary control, that it is different from a municipality, and its conduct should share Congress' antitrust immunity.

Plaintiffs also cite *Hecht v. Pro-Football, Inc.* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). As the D.C. Circuit has subsequently noted, the decision in *Hecht*

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23 *Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983) (Federal Reserve Banks immune from Sherman Act, even though they are partially privately-owned, because they were "created by Congress to perform important governmental functions"); *Feldman v. Gardner*, 661 F.2d 1295, 1307-08 (D.C. Cir. 1981), *vacated on other grounds sub nom. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (acts of a federal instrumentality are immune from antitrust scrutiny); *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (railroad owned and operated by United States may not be sued under the Sherman Act because "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act"); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680, 692 (7th Cir. 1980) (Army and Air Force Exchange Service immune from Robinson-Patman Act).

denied immunity to a corporation that was in the nature of "a private venture."[24] The government of Guam is a governmental entity acting in the public interest. Pet. App. 7-8.

It does not matter that the Governor and Legislature of Guam are popularly elected, rather than appointed directly by the federal government as was the Governor before 1968. Pet. 12; Pl. App. Brief at 3. By granting the people of Guam somewhat more autonomy, Congress surely did not intend to deny their government's actions antitrust immunity, and subject it to possible civil and criminal sanctions.

This conclusion is supported by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34, 35. Congress enacted that law to expand the antitrust immunity of "local governments" in damages cases. Rather than treating the Territories as local governments, which still do not have unlimited antitrust immunity, Congress in that statute included the territories within the definition of a "State," the conduct of which long has been held to have unqualified antitrust immunity. 15 U.S.C. §§ 15g(2), 34. *See Parker v. Brown*, 317 U.S. 341, 352 (1943). Far from being an incursion on the authority of Congress to regulate the Territories (*see* Pet. 12), the decision of the Court of Appeals implements Congress' exercise of that authority.

In any event, even under plaintiffs' position, the challenged conduct is immune from antitrust scrutiny. The conduct of a municipality is immune from the federal antitrust laws if it is a "foreseeable result" of authorizing state legislation. *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713, 1718 (1985). The Guam Organic Act empowers the Guam Legislature to impose "license fees, and royalties for franchises, privileges, and concessions . . . for purposes of the government of Guam."

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24 *Feldman v. Gardner*, 661 F.2d at 1307. *See also Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d at 247 ("*Hecht* does not supply analysis appropriate in a case in which the activities of a United States instrumentality are at issue"); *Sabin v. Berglund*, 585 F.2d 955, 960 (10th Cir. 1978) (defendant in *Hecht* not a federal agency).

48 U.S.C. § 1423a. That the government of Guam might grant exclusive licenses, "franchises, privileges, and concessions" in return for "license fees, and royalties" is certainly a foreseeable consequence of the statute. *See* Admissions at Res. App. 18, 23 (plaintiffs conceding that the GAA is empowered to decide who may do business at the Airport).[25] Indeed, the Guam policy of granting exclusive Airport concession rights has been in effect continuously since 1967, when it was initiated with the approval of a direct federal appointee. Pet. App. 8-9; Stone Dep., CR 80 at 17-26, 30; 1967 General Merchandising Concession Lease, ER at 305; Pl. App. Brief at 3.[26]

Accordingly, the challenged conduct is immune from antitrust scrutiny.

II. ON THE RECORD IN THIS CASE, THERE ARE NUMEROUS OTHER GROUNDS TO SUPPORT DISMISSAL OF PLAINTIFFS' CLAIMS

In defending the judgment of the Court of Appeals, defendants are entitled to assert any ground for dismissal available in the law and the record. *Thigpen v. Roberts*, 104 S. Ct. 2916, 2918 (1984); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). As the decision in the District Court and the concurring opinion in the Court of Appeals demon-

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25 *See also, e.g., Town of Hallie v. City of Eau Claire*, 105 S. Ct. at 1718 (statute authorizing city to provide sewage services and decide which areas should be serviced clearly contemplated that city may engage in anti-competitive conduct); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 522 (8th Cir. 1985) (exclusive solid waste disposal contract a foreseeable consequence of statute authorizing municipality to enter into agreements to provide solid waste management and disposal).

26 Plaintiffs do not deny that the GAA has actively supervised the operations of the concessionaire, *see* Stone Aff., ER at 279; 1978 Guam Airport Concession Agreement, ER 327-330; Stone Dep., CR 80 at 112-113, and have not contested the conclusion that if the challenged conduct is immune, DFS shares in the immunity. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985).

strate, numerous such grounds exist here in addition to those reached by the Court of Appeals.

The District Court dismissed plaintiffs' antitrust claims for the following reasons in addition to federal instrumentality immunity:

> (1) Any efforts by DFS to influence the GAA or GovGuam to grant an exclusive concession are immune under the *Noerr-Pennington*[27] doctrine. Pet. App. 10-11.
>
> (2) Plaintiffs lack standing because: they have no legal right to conduct their business at the Airport; any alleged injury to plaintiffs resulted from an increase, not a decrease, in competition; and plaintiffs' failure to secure Airport delivery privileges resulted from their own failure or inability to seek, qualify for, or obtain the rights offered. Pet. App. 11-14.
>
> (3) Because the GAA's refusal to allow plaintiffs to make deliveries at the Airport was final more than four years before this suit was filed, plaintiffs' claims are barred by the statute of limitations. Pet. App. 16-18.
>
> (4) Because plaintiffs waited to sue until after the current concession had been awarded, after DFS' guarantee had been used to sell airport revenue bonds, after the money so raised had been spent to construct the new terminal complex and after the new complex had been completed, plaintiffs' claims are barred by the doctrine of laches. Pet. App. 18.
>
> (5) Because the Airport concession allows the provision of services that otherwise would not be available, facilitates the operation of the Airport and benefits tourism

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27 *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

and the economy of Guam, and because the current concession was granted pursuant to an open and fair competitive bid, defendants' conduct was reasonable as a matter of law. Pet. App. 14-15.

(6) The exclusivity of the current concession resulted from a unilateral decision by the GAA to grant exclusive rights, not from concerted action. Pet. App. 11.

In addition to recognizing the inapplicability of the dormant Commerce Clause to the government of Guam, the District Court dismissed plaintiffs' Commerce Clause claims on the grounds, *inter alia*, that because plaintiffs have no right to do business at the Airport, and the concession greatly benefits the Airport and the Guam tourism industry, the concession does not burden commerce and, indeed, promotes it. Pet. App. 19. In his concurring opinion, Circuit Judge Hug found that "[t]here is no burden on interstate commerce, there is only a limitation on the use of the airport as a facility to complete the sale by delivery." Pet. App. 29.

The GAA and DFS have also raised other defenses that have not heretofore been reached: They contend that plaintiffs' Commerce Clause claims are barred by the doctrine of laches, and are legally deficient because plaintiffs have suffered no legal injury and have shown no causal nexus between any alleged injury and the purported violation; the GAA claims sovereign immunity; and DFS contends that there can be no cause of action against it for the alleged violation of plaintiffs' constitutional rights.

Plaintiffs' briefs have never addressed defendants' laches defenses. Nor have they contested the defenses that the current concession is reasonable as a matter of law because it was granted by a competitive bidding process, and that plaintffs lack standing because of their failure in 1978 to seek the concession or non-exclusive delivery privileges.

If it decided to review this case, the Court would be confronted with all the grounds for dismissal discussed in this section, in addition to those discussed above.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 28.1 Statement of Respondent Duty Free Shoppers, Ltd.

DFS Group Limited
Classic Jewellers International Limited
Classic Leather Ltd.
Le Classique (Private) Limited
Duty Free Shoppers K.K.
Duty Free Shoppers Group Limited
International Credit Systems Ltd.
Le Classique Duty Free Shoppers Limited
Duty Free Shoppers Palau
CBOS Limited
Duty Free Shoppers Limited
Duty Free Shoppers N.V.
Clarisse Limited
Preferred Products Limited
CBOS N.V.
DFS Marketing Pty. Ltd.
DFS (1973) Limited
Preferred Products (Private) Ltd.
Commonwealth Investment Company, Inc.
Aero Shops, Inc.
RHC Luggage, Inc.
Duty Free Shoppers LAX, Inc.
Ukana Limited
Hawaiian King Candies Limited
Duty Free Shoppers JFK, Inc.
DFS North America, N.V.
Duty Free Shoppers (Private) Limited
Le Classique (Macau) Limited
Le Classique Limited
International Gift Shops, Inc.
Amana Corporation
42269 Ontario Limited
DFS Properties, Inc.
Marine Tobacco Company, Inc.
DFS Group Limited (Panama)
DFS Group (C.N.M.I.)

APPENDIX B

Statutes, Rules and Regulations, and Ordinance

ORGANIC ACT OF GUAM,
48 U.S.C. §§ 1421-1428 (as amended) (Excerpts)

§ 1421a. Unincorporated territory; capital; powers of government; suits against government; type of government; supervision

Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.

§ 1421b. Bill of rights

(a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.

(b) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

(c) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated; and no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

(d) No person shall be subject for the same offense to be twice put in jeopardy of punishment; nor shall he be compelled in any criminal case to be a witness against himself.

(e) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

(g) In all criminal prosecutions the accused shall have the right to a speedy and public trial; to be informed of the nature and cause of the accusation and to have a copy thereof; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(h) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(i) Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in Guam.

(j) No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

(k) No person shall be imprisoned for debt.

(l) The privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion or imminent danger thereof, the public safety shall require it.

(m) No qualification with respect to property, income, political opinion, or any other matter apart from citizenship, civil capacity, and residence shall be imposed upon any voter.

(n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied.

(o) No person shall be convicted of treason against the United States unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(p) No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

(q) The employment of children under the age of fourteen years in any occupation injurious to health or morals or hazardous to life or limb is hereby prohibited.

(r) There shall be compulsory education for all children, between the ages of six and sixteen years.

(s) No religious test shall ever be required as a qualification to any office or public trust under the government of Guam.

(t) No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the government of Guam or of the United States shall be qualified to hold any public office of trust or profit under the government of Guam. (Aug. 1, 1950, c. 512, § 5, 64 Stat. 385.)

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are

inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

(As amended Sept. 11, 1968, Pub.L. 90-497, § 10, 82 Stat. 847.)

§ 1422. Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress

* * * *

The Governor shall prepare, publish, and submit to the Congress and the Secretary of the Interior a comprehensive annual financial report in conformance with the Standards of the National Council on Governmental Accounting within one hundred and twenty days after the close of the fiscal year. The comprehensive annual financial report shall include statistical data as set forth in the standards of the National Council on Governmental Accounting relating to the physical, economic, social, and political characteristics of the government, and any other information required by the Congress. The Governor shall transmit the comprehensive annual financial report to the Inspector General of the Department of the Interior who shall audit and report his findings to the Congress. The Governor shall also make such other reports at such other times as may be required by the Congress or under applicable Federal law. He shall also submit to the Congress, the Secretary of the Interior, and the cognizant Federal auditors a written statement of actions taken or contemplated on Federal audit recommendations within sixty days after the issuance date of the audit report.

* * * *

§ 1422d. Transfer of functions from government comptroller for Guam to Inspector General, Department of the Interior

(a) Functions, powers and duties transferred

The following functions, powers, and duties heretofore vested in the government comptroller for Guam are hereby

transferred to the Inspector General, Department of the Interior, for the purpose of establishing an organization which will maintain a satisfactory level of independent audit oversight of the government of Guam:

(1) The authority to audit all accounts pertaining to the revenue and receipts of the government of Guam, and of funds derived from bond issues, and the authority to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to the government of Guam including those pertaining to trust funds held by the government of Guam.

(2) The authority to report to the Secretary of the Interior and the Governor of Guam all failures to collect amounts due the government, and expenditures of funds or uses of property which are irregular or not pursuant to law.

(b) Scope of authority transferred

The authority granted in paragraph (a) of this section shall extend to all activities of the government of Guam, and shall be in addition to the authority conferred upon the Inspector General by the Inspector General Act of 1978 (92 Stat. 1101), as amended.

* * * *

§ 1423a. Power of Legislature; limitation on indebtedness of Guam; bond issues; guarantees for purchase by Federal Financing Bank of Guam Power Authority bonds or other obligations; interest rates; default

The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and when necessary to anticipate taxes

and revenues, bonds and other obligations may be issued by the government of Guam . . . .

* * * *

§ 1423i. Approval of bills

Every bill passed by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor. . . . All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 1421a of this title. The Congress of the United States reserves the power and authority to annul the same.

§ 1424-2. Relations between courts; United States Court of Appeals for the Ninth Circuit; review of appellate court decisions; reports to Congress; rules

* * * *

[F]or the first fifteen years following the establishment of the appellate court authorized by section 1424-1 of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(Added Oct. 5, 1984, Pub. L. 98-454, 98 Stat. 1742.)

ALASKA ORGANIC ACT,
48 U.S.C. § 23 (repealed) (Excerpt)

§ 23. Constitution and laws of the United States extended

The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

* * * *

SHERMAN ACT
15 U.S.C. §§ 1, 2, 3 (Excerpts)

§ 1. Trusts, etc.; in restraint of trade illegal; exception of resale price agreement; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

* * * *

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.

* * * *

§ 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any

State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * *

LOCAL GOVERNMENT ANTITRUST ACT OF 1984, 15 U.S.C. §§ 34, 35

§ 34. Definitions applicable to Local Government Antitrust Act of 1984 provisions

For purposes of this section and sections 35 and 36 of this title—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law,

* * * *

(3) the term "State" has the meaning given it in section 15g(2) of this title.

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 15g(2)

§ 15g. Definitions

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

PUBLIC LAW 13-57, GUAM GOV'T CODE §§ 62000-62124, AND SECTIONS 1-5 (Excerpts)

Enacted: September 26, 1975

AN ACT TO REPEAL CHAPTER IV OF TITLE XLIV OF THE GOVERNMENT CODE AND TO ADD A NEW TITLE LXVI TO THE GOVERNMENT CODE TO CREATE A GUAM AIRPORT AUTHORITY AND AUTHORIZE THE ISSUANCE OF REVENUE BONDS BY SAID AUTHORITY.

§ 62001. There is within, and a public corporation and autonomous instrumentality of, the government of Guam called the Guam Airport Authority.

§ 62004. The Authority shall have and exercise each and all of the following powers:

(a) Acquire, construct, reconstruct, purchase, better, extend, improve, operate and maintain airports and related facilities owned or used by Guam for civil aviation purposes.

* * * *

(e) To impose, prescribe, revise and collect fees, rates, rentals, landing fees and charges for the use and services of, and the facilities and commodities furnished by the airports operated by the Authority and to charge and collect any fees permitted by the Joint Use Agreement, and to pay charges and costs imposed by said Agreement upon Guam.

* * * *

(h) To make and enter into contracts, leases, concession agreements and permits and to execute all instruments necessary or convenient in the exercise of its powers, including without limitation, the purchase of liability and casualty insurance for airport purposes, adopt a seal and sue or be sued in its own corporate name.

* * * *

(l) To adopt such rules and regulations, pursuant to the Administrative Adjudication Act, as may be necessary for the exercise of powers and performance of the duties conferred or imposed upon the Authority or the Board.

(m) To do any and all other things necessary to the full and convenient exercise of the above powers.

* * * *

§ 62013. Penalties. (a) Any person who violates any provision of this Chapter, or any valid rule or regulation promulgated under this Chapter, or any valid Executive Order issued with respect to the operations of the Authority, or who refuses or neglects to comply with any lawful order given by the Executive Manager or his delegate concerning the operation of the airports under the control of the Authority, is punishable by a fine of not to xceed One Thousand Dollars ($1,000.00), or by imprisonment not to exceed six (6) months, or both.

* * * *

§ 62010. It is declared to be the policy of Guam that the Authority in acquiring, constructing, reconstructing, purchasing, bettering, extending or improving the Airports pursuant to this Title, shall manage and operate the Airports in the most efficient manner consistent with the protection of the bondholders.

§ 62114. The Authority shall impose, prescribe and collect rates, rentals, fees or charges for the use and services of and the facilities and commodities furnished by the Airports, including landing fees as permitted, and shall revise such rates,

rentals, fees, charges and landing fees from time to time whenever necessary to keep the Airports on a self-sustaining basis. The rates, rentals, fees, charges and landing fees imposed and prescribed shall produce revenues which will be at least sufficient:

(a) To make the required payments of the principal of and interest on all bonds issued for the Airports;

(b) To pay the cost of operation, maintenance and repair of the Airports, including reserves therefor;

(c) To carry out the covenants of the bond resolution or resolutions authorizing the issuance of the bond; and

(d) To repay without interest to the government of Guam for advances hereafter made for or on account of the Airports, including the allocable portions of principal and interest on rehabilitation loans made for or on account of the Airports, as disclosed by historic annual financial reports of relevant operations.

Section 5. Within two (2) weeks after the confirmation of the Board of Directors, the Director of Commerce shall transfer to the Authority:

* * * *

(c) All working capital, cash, accounts payable and receivable, deposits, advances, payable and receivable, all books, records and documents, and all other rights, obligations, assets, liabilities, agreements, contracts, leases, concessions and all other rights, obligations and privileges pertaining to the operation of the Guam International Air Terminal and other matters and concerns of the Department of Commerce which are to be assumed by the Authority, including the assets in the Guam International Air Terminal Fund.

ALASKA STAT. § 02.15.091

Alaska Stat. § 02.15.091

Sec. 02.15.091. Sale and delivery of in-bond merchandise at international airports. (a) As provided by (b) and (c) of this section, the department shall allow the sale and delivery of in-bond merchandise at an international airport only by an exclusive contract.

* * * *

RULES AND REGULATIONS OF THE GUAM AIRPORT AUTHORITY

Title 4, COMMERCE (Orig. Pub. 2-15-75) (Rev. 6-30-82) (Excerpts)

Part A. General

§ *3030. Authority.*

The following rules and regulations are hereby promulgated by the Board of Directors of the Guam Airport Authority in accordance with Public Law 13-57 and shall have the force and effect of law.

§ *3030.3. Commercial Activity.*

No person shall carry on any commercial activity at the Air Terminal without the written consent of the Authority.

§ *3030.5. Storage of Cargo.*

Unless otherwise provided by a lease or other contractual agreement, no person shall use any area of the Air Terminal for storage of cargo or any other property without permission of the Manager. If, notwithstanding the above prohibition, a person uses such areas for storage, as aforesaid, without first obtaining such permission, then the Manager shall have authority to order the cargo or any other property removed or

to cause the same to be removed and stored, at the expense of the owner or consignee thereof, without responsibility or liability for damages arising therefrom.

§ *3036.4. Selling, Soliciting and Entertaining.*

No person, except those persons or firms authorized by written contract to do so or any other persons with the written permission of the Manager for specific occasions, shall in or upon any area, platform stairway station, waiting room or any other appurtenance of the Air Terminal:

(a) Sell, or offer for sale, any article or merchandise;

* * * *

§ *3039.5. Penalties.*

* * * *

(b) Persons violating these rules and regulations, other than those referred to in (a) above, may be ejected from the airport premises by the Manager or his delegate. In addition, such persons are subject to prosecution under the Penal Code of Guam if the violation of these rules and regulations is also a violation of the Penal Code with fines not to exceed One Thousand Dollars ($1,000.00), per incident.

(c) Personal property or other goods placed on the Air Terminal premises in violation of the rules and regulations may be removed from the place where found by the Manager or his delegate kept by him until reclaimed by the owners, or if not claimed, then disposed of by the Manager. Such articles may not be claimed except upon the payment of a fee, to be determined by the Manager, for the cost of storage and removal of the property in question.

HAWAII ADMINISTRATIVE RULE § 19-14-3(i)

(i) Commercial Activity. No person shall engage in any business or commercial activity, for a fee or gratuity, in or at a public airport without the permission of the director.

LOS ANGELES CITY ADMINISTRATIVE CODE, Art. 4, Ch.1, Div. 23, § 23.27(b)

No person shall engage in any business or commercial activity of any kind whatsoever on the Airport without first having applied for and obtained the appropriate license, lease or permit therefor.

APPENDIX C

Admissions

Responses of Sakamoto and Pacific Gift Supply, Inc., and Responses of Top Enterprises, Inc., to Requests for Admissions, March 4, 1983 (CR46) (Excerpts)

1. *Responses of Sakamoto and Pacific Gift Supply, Inc.*

8. Fostering the general welfare of the people of Guam is a lawful goal and mandate of the GAA.

A. Admit

9. The GAA made the 1978 Concession available to all interested and qualified parties through an open competitive procedure.

A. Admit

12. Prior to awarding the 1978 Concession, the GAA published formal notice in a variety of newspapers, asking all interested and qualified parties to request bid information.

A. Admit

13. You promptly became aware of the GAA's request that interested and qualified parties request bid information relating to the 1978 Concession.

A. Admit

14. Competition for the 1978 Concession was strongly encouraged by the GAA.

A. Admit

16. The highest qualified bidder won the 1978 Concession.

A. Admit

17. You never requested bid information relating to the 1978 Concession.

A. Admit

19. You never in any way sought to bid for the 1978 Concession.

A. Admit

21. The pre-bid qualification criteria for the 1978 Concession were reasonable criteria which attempted to ensure that the concessionaire was financially sound and experienced in operating an airport concession.

A. Admit

22. You did not in 1978 challenge the pre-bid qualification criteria for the 1978 Concession as unreasonable, or in any way indicate to the GAA Board that you felt they were too restrictive.

A. Admit

23. You did not in 1978 ask the GAA to make the 1978 Concession non-exclusive.

A. Admit

24. You did not in 1978 seek to influence the GAA to offer non-exclusive rights to deliver goods at the GIAT.

A. Admit

25. You did not in 1978 ask the GAA to change its bid procedures or pre-bid qualification criteria for the 1978 Concession.

A. Admit

26. You did not seek to bid on or otherwise obtain the 1967 Concession.

A. Admit

27. You could not have competed for the 1967 Concession for the reason that you did not exist or you were not yet in business in Guam.

A. Admit

28. You have never requested permission to sell goods at the GIAT.

A. Admit

30. The health of the tourism industry is critical to the general economic welfare of Guam.

A. Admit

48. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to exclude anyone from making sales or deliveries of goods at the GIAT, unless that person has received written permission from the GAA to make such sales or deliveries.

A. Admit

48a. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to eject from the GIAT premises any person attempting to make sales and deliveries of goods at the GIAT without the required permission.

A. Admit

49. You have never received written permission from the GAA to sell or deliver goods at the GIAT.

A. Admit

51. The goods which you attempted to deliver at the GIAT are offered for sale by you, and paid for by customers, at locations other than the GIAT.

A. Admit

52. You are able to deliver the goods purchased by your customers at locations other than the GIAT.

A. Admit

53. You are able to, and do, sell and deliver goods to persons who will depart Guam via the GIAT even though you are not permitted to sell or deliver at the GIAT.

A. Admit

58. The price of the macadamia nut candy sold by you is higher than the price charged by DFS for similar candy sold by it in its Guam stores.

A. Admit

59. The price of the other goods sold by you is higher than the price charged by DFS for similar goods in its Guam stores.

A. Admit

60. You are one of the leading sellers of macadamia nut candy in Guam.

A. Admit

60a. You are the leading seller of macadamia nut candy in Guam.

A. Admit

61. Your business is profitable.

A. Admit

62. Japanese tourists and other persons are able to and do buy macadamia nut candy in Guam at stores other than those operated by DFS and you.

A. Admit

63. Japanese tourists and others can and do buy other goods, including gift items, from numerous vendors in Guam other than you and DFS.

A. Admit

64. Japanese tourists and others can and do buy goods, including gift items, at:

(a) The Carl Rose Gift Shop, Marine Drive, Tumon
A. Admit

(b) Townhouse Department Store, Agana Shopping Center, Route 4, Agana
A. Admit

(c) Para Para, Marine Drive, East Agana
A. Admit

(d) Hakubotan, Marine Drive, Tamuning
A. Admit

(e) Gibson's Department Store, Guam Shopping Center, Chalan San Antonio, Tamuning
A. Admit

(f) Europa House, Marine Drive, Tamuning
A. Admit

(g) Perez Store, Route 4, Ipan, Talofofo
A. Admit

(h) International Gift Center, Chalan San Antonio, Tamuning
A. Admit

(i) The various shops other than yours at the Tumon Sands Plaza, Tumon
A. Admit

(j) The gift shops at Cocos Island, Merizo
A. Admit

(k) Best Department Store, Marine Drive, Agana
A. Admit

(l) Jenny's Fashions
A. Admit

(m) the gift shop at the Guam Hilton Hotel, Tumon
A. Admit

65. The stores and shops listed in Request for Admission No. 64 endeavor to sell goods, including gift items, to Japanese tourists and other persons to which you and DFS also endeavor to sell goods.
A. Admit

66. None of the stores listed in Request for Admission No. 64 may sell or deliver goods at the GIAT.
A. Admit

67. You and the stores listed in Request for Admission No. 64, combined sell more goods, including gift items, than does DFS in Guam.
A. Admit

71. If you were allowed to make sales and/or deliveries at the GIAT, then all others so requesting would also have to be allowed to do so.
A. Admit

77. Tourists purchase goods, including gift items, all over Guam.

A. Admit

78. Tourists receive the goods, including gift items, they purchase on Guam at many locations in Guam other than the GIAT.

A. Admit

79. Orderly operation of the GIAT is critical to its proper functioning.

A. Admit

2. *Responses of Top Enterprises, Inc.*

8. Fostering the general welfare of the people of Guam is a lawful goal and mandate of the GAA.

A. Admit

9. The GAA made the 1978 Concession available to all interested and qualified parties through an open competitive procedure.

A. Admit

12. Prior to awarding the 1978 Concession, the GAA published formal notice in a variety of newspapers, asking all interested and qualified parties to request bid information.

A. Admit

13. You promptly became aware of the GAA's request that interested and qualified parties request bid information relating to the 1978 Concession.

A. Admit

14. Competition for the 1978 Concession was strongly encouraged by the GAA.

A. Admit

16. The highest qualified bidder won the 1978 Concession.

A. Admit

17. You never requested bid information relating to the 1978 Concession.

A. Admit

19. You never in any way sought to bid for the 1978 Concession.

A. Admit

21. The pre-bid qualification criteria for the 1978 Concession were reasonable criteria which attempted to ensure that the concessionaire was financially sound and experienced in operating an airport concession.

A. Admit

22. You did not in 1978 challenge the pre-bid qualification criteria for the 1978 Concession as unreasonable, or in any way indicate to the GAA Board that you felt they were too restrictive.

A. Admit

23. You did not in 1978 ask the GAA to make the 1978 Concession non-exclusive.

A. Admit

24. You did not in 1978 seek to influence the GAA to offer non-exclusive rights to deliver goods at the GIAT.

A. Admit

25. You did not in 1978 ask the GAA to change its bid procedures or pre-bid qualification criteria for the 1978 Concession.

A. Admit

26. You did not seek to bid on or otherwise obtain the 1967 Concession.

A. Admit

27. You could not have competed for the 1967 Concession for the reason that you did not yet exist.

A. Admit

30. The health of the tourism industry is critical to the general economic welfare of Guam.

A. Admit

44. The GAA is authorized by its Rules and Regulations, and has been so authorized since at least 1977, to exclude anyone from making sales or deliveries of goods at the GIAT, unless that person has received written permission from the GAA to make such sales or deliveries.

A. Admit

45. The GAA is authorized by its Rules and Regulations, and has been authorized since at least 1977, to eject from the GIAT premises any person attempting to make sales and deliveries of goods at the GIAT without the required permission.

A. Admit

46. You have never received written permission from the GAA to sell or deliver goods at the GIAT.

A. Admit

47. You are able to deliver the goods purchased by your customers at locations other than the GIAT.

A. Admit

48. You are able to, and do sell and deliver goods to persons who will depart Guam via the GIAT even though you are not permitted to sell or deliver at the GIAT.

A. Admit

51. The prices of the goods sold by you are as high or higher than the prices charged by DFS for similar goods in its Guam stores.

A. Admit

52. Your business is profitable.

A. Admit

53. Japanese tourists and others can and do buy goods, including gift items, from numerous vendors in Guam other than you and DFS in Guam.

A. Admit

54. Japanese tourists and others can and do buy goods, including gift items, at:

(a) The Carl Rose Gift Shop, Marine Drive, Tumon
A. Admit

(b) Townhouse Department Store, Agana Shopping Center, Route 4, Agana
A. Admit

(c) Para Para, Marine Drive, East Agana
A. Admit

(d) Hakubotan, Marine Drive, Tamuning
A. Admit

(e) Gibson's Department Store, Guam Shopping Center, Chalan San Antonio, Tamuning
A. Admit

(f) Europa House, Marine Drive, Tamuning
A. Admit

(g) Perez Store, Route 4, Ipan, Talofofo
A. Admit

(h) Yokohama Okadaya, Marine Drive, Tamuning
A. Admit

(i) The various shops at Tumon Sands Plaza, Tumon
A. Admit

(j) The gift shops at Cocos Island, Merizo
A. Admit

(k) Dragon Duty Free Shop, Tumon
A. Admit

(l) Jenny's Fashions
A. Admit

(m) The stores and gift shop at the Guam International Trade Center, Tamuning
A. Admit

(n) Pacific Gift Supply, Inc.
A. Admit

55. The stores and shops listed in Request for Admission No. 54 endeavor to sell goods, including gift items, to Japanese tourists and other persons to which you and DFS also endeavor to sell goods.
A. Admit

56. None of the stores listed in Request for Admission No. 54 may sell or deliver goods at the GIAT.
A. Admit

58. Some of your stores are able to and do make deliveries of goods to tourists at their hotels as a special service.
A. Admit

61. If you were allowed to make sales and/or deliveries at the GIAT, then all others so requesting would also have to be allowed to do so.
A. Admit

67. Tourists purchase goods, including gift items, all over Guam.
A. Admit

68. Tourists receive the goods, including gift items, they purchase on Guam at many locations in Guam other than the GIAT.
A. Admit

69. Orderly operation of the GIAT is critical to its proper functioning.
A. Admit